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# Why Bias Challenges to Administrative Adjudication Should Succeed

Kent Barnett\*

## I. INTRODUCTION

How much confidence would you have in a judge whom your opponent hired, can pay bonuses to, and can seek to discipline or remove? If your answer is not much, then you best not interact with the federal government. I recently argued that numerous administrative adjudicators very likely suffer from an unconstitutional appearance of partiality because the agencies that are often parties in administrative hearings can hire, pay bonuses to, discipline, and remove these adjudicators.<sup>1</sup>

In this Article for the *Missouri Law Review's* Symposium on *A Future Without the Administrative State?*, I contend that challenges to adjudicators' appearance of partiality are well positioned to be part of the new wave of structural challenges to the administrative state. Many of these structural challenges have arisen in the separation-of-powers context, which has experienced a renaissance since 2010. From the President's supervisory powers<sup>2</sup> to appointments of federal officers,<sup>3</sup> from Article III protections<sup>4</sup> to judicial review of administrative action,<sup>5</sup> from delegation of powers to private parties<sup>6</sup> to legislative standing,<sup>7</sup> the Supreme Court of the United States and individu-

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1. Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1650–83 (2016) [hereinafter Barnett, *Against Administrative Judges*]. See Kent Barnett, Opinion, *Due Process v. Administrative Law*, WALL ST. J. (Nov. 15, 2015, 5:20 PM), <http://www.wsj.com/articles/due-process-vs-administrative-law-1447626023>.

2. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 478–79 (2010).

3. See *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2556 (2014).

4. See *Stern v. Marshall*, 564 U.S. 462, 469 (2011).

5. See Brian Lipshutz, Note, *Justice Thomas and the Originalist Turn in Administrative Law*, 125 YALE L.J.F. 94 (2015) (summarizing Justice Thomas's recent call for reconsidering judicial deference to agency action); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1212–13 (2015) (Scalia, J., concurring) (arguing that the Court should stop deferring to agencies' interpretations of their regulations under so-called *Auer* deference); see also *id.* at 1213 (Thomas, J., concurring) (encouraging reconsideration of *Auer* deference); accord *id.* at 2010–11 (Alito, J., concurring). Chief Justice Roberts, in an earlier concurring opinion in which Justice Alito joined, stated his willingness to reconsider *Auer* deference. See *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1338–39 (2013) (Roberts, C.J., concurring).

6. See *Dep't of Transp. v. Ass'n of Am. R.R.s*, 135 S. Ct. 1225, 1231 (2015).

7. See *United States v. Windsor*, 133 S. Ct. 2675, 2688 (2013) (relying upon the U.S. House of Representatives' Bipartisan Legal Advisory Group's "sharp adversarial

al Justices have welcomed structural challenges to the administrative state and Article I courts.<sup>8</sup> Although not sounding in separation of powers under current doctrine,<sup>9</sup> partiality under the Due Process Clause concerns prophylactic limitations that protect adjudicators' independence and, more broadly, cabin how administrative adjudication can occur.<sup>10</sup>

Administrative adjudication's partiality problem is a worthy candidate to join these claims for three reasons. First, prohibiting administrative adjudicators' partiality, unlike some other structural areas, does not require overruling prior decisions and relies heavily on the Court's recent precedent. Second, partiality challenges fit comfortably within the Court's penchant for formalism and prophylaxes in structural constitutional matters. Indeed, formalism is much more justified for partiality challenges than certain other structural issues and has a longer jurisprudential provenance. Finally, as compared to other proposed challenges to the administrative state, challenges based on administrative partiality are more likely to earn enough votes to succeed. Because finding partiality within the administrative state would likely have significant, widespread disruptive effects, the President, agencies, and Congress should rethink administrative adjudication before courts make them do so.

## II. THE PARTIALITY ARGUMENT AGAINST ADMINISTRATIVE JUDGES

In a recent article,<sup>11</sup> I contended that certain administrative adjudicators have an appearance of partiality that very likely violates the Due Process Clause. These adjudicators go by many names – such as hearing officer, Immigration Judge, Patent Appellate Judge, or hearing examiner – but are collectively referred to as “Administrative Judges” or “AJs,” titles similar to the more well-known Administrative Law Judges or ALJs.<sup>12</sup> The approximately 1600 ALJs and approximately 3300 AJs perform the same function.<sup>13</sup> They preside over trial-like administrative hearings, admit evidence, make credibility determinations, and issue initial opinions after compiling an evidentiary record.<sup>14</sup> In these hearings, agencies, which often appear as parties, can seek

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presentation” to find Article III standing, but not deciding whether the group itself had Article III standing).

8. *Decker*, 133 S. Ct. at 1338–39.

9. *But see* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672 (2012) (arguing that due process was understood to concern separation of powers and limited the legislature's ability to affect individual rights).

10. *Id.* at 1773.

11. For the thorough development of this due process argument, see Barnett, *Against Administrative Judges*, *supra* note 1. What follows is a summary of that argument, for which I shall refer only to the most relevant authority.

12. *Id.* at 1659–60.

13. *Id.* at 1652.

14. *Id.*

to enforce statutory or regulatory provisions by awarding or terminating benefits, issuing or revoking licenses, assessing penalties, or resolving disputes between private parties.<sup>15</sup> Despite their similar names and functions, almost all AJs lack the statutory independence of ALJs.<sup>16</sup>

Start by contrasting AJs' and ALJs' appointments. All of the nearly 1600 ALJs<sup>17</sup> are appointed under a merit-focused statutory selection process. Although the agency for which an ALJ works directly appoints the ALJ,<sup>18</sup> an independent agency, the Office of Personnel Management ("OPM"), limits the choice to the three highest-scoring candidates based on written examination and other scores.<sup>19</sup> To certain agencies' chagrin, the OPM does not consider candidates' subject-matter expertise but instead seeks to hire generalists.<sup>20</sup> In contrast, an agency's ability to appoint nearly all AJs is not constrained by similar statutory procedures or an independent agency's oversight.<sup>21</sup> At most, agencies may be bound by general Civil Service requirements<sup>22</sup> and use self-crafted hiring guidelines.<sup>23</sup>

After AJs and ALJs are hired, the Administrative Procedure Act ("APA") protects ALJs, but not AJs, from their agencies in various ways. ALJs must preside over "formal adjudication" – i.e., hearings that are required to be "on the record."<sup>24</sup> With formal adjudication, ALJs cannot perform investigative or prosecutorial functions, nor report to an agency official who does.<sup>25</sup> They generally cannot have *ex parte* communications with the

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15. *Id.* at 1647.

16. *Id.*

17. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 586 tbl.C (2010) (noting that the Office of Personnel Management informed the Court that there were 1584 federal ALJs, 1334 of whom worked within the SSA).

18. 5 U.S.C. § 3105 (2012).

19. *See* VANESSA K. BURROWS, CONG. RESEARCH SERV., RL34607, ADMINISTRATIVE LAW JUDGES: AN OVERVIEW 2–3 (2010), <http://ssaconnect.com/tfiles/ALJ-Overview.pdf>.

20. *See* OPM, EXAMINATION ANNOUNCEMENT NO. 318, at 8 (1996).

21. *See* Paul R. Verkuil, *Reflections Upon the Federal Administrative Judiciary*, 39 UCLA L. REV. 1341, 1347 (1992) ("The selection and appointment procedures for administrative judges are controlled by the agencies themselves."). A key exception exists for certain members of the Board of Contract Appeals, who, per statute, must have "at least 5 years of experience in public contract law" and be appointed in the same manner as ALJs. 41 U.S.C. §§ 7105(a)(2), (b)(2)(A), (d)(2). The appointment process, although similar to that for ALJs, is handled by the hiring agencies, not the OPM. *See* 2 PAUL R. VERKUIL ET AL., ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 950–51 (1992), [https://www.acus.gov/sites/default/files/documents/1992-2%20ACUS%20\(Green%20Book\).pdf](https://www.acus.gov/sites/default/files/documents/1992-2%20ACUS%20(Green%20Book).pdf).

22. *See* 5 U.S.C.A. §§ 2301, 2302 (West 2016).

23. *See* John H. Frye III, *Survey of Non-ALJ Hearing Programs in the Federal Government*, 44 ADMIN. L. REV. 261, 272 (1992).

24. 5 U.S.C. § 554(a).

25. *Id.* §§ 554(d)(2), 3105.

parties (including agency officials) concerning a fact issue.<sup>26</sup> Agencies cannot give ALJs performance reviews<sup>27</sup> or pay them bonuses.<sup>28</sup> Because AJs, in contrast, cannot preside over formal adjudication, they do not receive formal adjudication's protections.<sup>29</sup> No statute prohibits them from engaging in investigative or prosecutorial functions or reporting to those who do, receiving performance reviews or bonuses from the agencies that appear before them, or communicating with agency officials concerning facts at issue in a pending case.<sup>30</sup> Indeed, based upon the most recent data, 83% of AJs are subject to agency-led performance reviews.<sup>31</sup>

The key difference between ALJs and AJs concerns their protection (or lack thereof) from discipline and removal. Agencies may discipline or remove ALJs only for "good cause established and determined by the Merit Systems Protection Board [("MSPB")] after a formal administrative hearing."<sup>32</sup> The MSPB members also enjoy protection from at-will removal because the President can remove them "only for inefficiency, neglect of duty, or malfeasance in office."<sup>33</sup> Contrary to this significant job protection for all ALJs, nearly all AJs lack statutory protection from discipline or removal.<sup>34</sup>

AJs' lack of statutory protections to shield them from agency oversight likely creates an unconstitutional appearance of partiality based on three related considerations. First, due process applies to administrative adjudication and precludes appearances of partiality, as the Supreme Court so held when considering whether the use of insurance-carrier hearing officers to decide Medicare claims violated due process.<sup>35</sup>

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26. *Id.* § 554(d)(1).

27. *See* FED. ADMIN. JUDICIARY, ADMIN. CONF. OF THE U.S., RECOMMENDATION 92-7, at 2 (1992), <https://goo.gl/C4psHb> [hereinafter 1992 ACUS RPT.]

28. 5 C.F.R. §§ 903.206(a)–(b), 903.210(b) (West 2016).

29. 1992 ACUS RPT., *supra* note 27, at 2.

30. *Cf.* 5 U.S.C. § 1305.

31. RAYMOND LIMON, OFFICE OF ADMINISTRATIVE LAW JUDGES, THE FEDERAL ADMINISTRATIVE JUDICIARY THEN AND NOW – A DECADE OF CHANGE 1992–2002, at 4 (2002).

32. 5 U.S.C. § 7521(a).

33. *Id.* § 1202(d). The MSPB's protection from removal only for inefficiency, neglect, and malfeasance appears strong because no President has ever attempted to remove any official (whether a MSPB member or other official with similar protection) under this standard. *See id.* *See also* Kent H. Barnett, *Avoiding Independent Agency Armageddon*, 87 NOTRE DAME L. REV. 1349, 1379 (2012) [hereinafter Barnett, *Avoiding Independent Agency Armageddon*].

34. Only a small group of judges on the Civilian Board of Contract Appeals shares ALJs' statutory protections from removal. 41 U.S.C. § 7105(b)(3).

35. *Schweiker v. McClure*, 456 U.S. 188, 195–96 (1982) (citing *In re Murchison*, 349 U.S. 133, 136 (1955)); *Withrow v. Larkin*, 421 U.S. 35, 46–47 (1975) (“[Due process] applies to administrative agencies which adjudicate as well as to courts.” (citing *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973))). The Court in *McClure* noted that the challenging party did not assert that the hearing officers at issue were actually biased. *See McClure*, 456 U.S. at 195 n.8.

Second, a litigating party's disproportionate role in appointing a judge before whom it is certain to appear creates an unconstitutional appearance of partiality. This principle comes from *Caperton v. A.T. Massey Coal Co.*, in which the Court held that such an appearance existed when a party with a case pending before the Supreme Court of Appeals of West Virginia provided substantial and disproportionate contributions for the campaign of one of the justices.<sup>36</sup> This scenario implicated the principle that "fears of bias can arise when – without the other parties' consent – a man chooses the judge in his own cause."<sup>37</sup> The Court did not care that the justice denied harboring any actual bias<sup>38</sup> or that voters directly elected the justice. With AJs, agencies do more than indirectly appoint them through disproportionate influence; they directly "choose[] the judge in [their] own cause" without even the oversight of an independent agency, as with ALJ hiring.<sup>39</sup>

Third, the ability to discipline, remove, or affect the salary of an adjudicator also creates an unconstitutional appearance of partiality. The Supreme Court emphasized in *Free Enterprise Fund v. Public Co. Accounting Oversight Board* that at-will removal directly affects whether an official is independent: "[O]ne who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will."<sup>40</sup> With AJs, agencies that often appear as parties can discipline, remove, or award bonuses with only limitations that exist under general Civil Service Laws.<sup>41</sup> Together, agencies' appointment and control over AJs likely creates an appearance of partiality that offends due process. Partiality challenges, as I discuss in Parts III and IV, are consonant with due process precedent and structural challenges generally.

### III. CONSISTENCY WITH PARTIALITY PRECEDENT

Partiality challenges concerning AJs are consistent with the Supreme Court's prior decisions and rely heavily on its most recent decisions. The relevant partiality precedent mostly concerns state adjudicators, but it is consistent with finding that AJs have a due process problem. The Supreme Court decisions that concern administrative adjudicators are either distinguishable or seemingly limited by more recent decisions.<sup>42</sup>

The two most relevant decisions concerning state judges – *Tumey v. Ohio* and *Ward v. Village of Monroeville* – are important because they reveal

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36. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 886–87 (2009).

37. *Id.* at 886.

38. *See id.* at 885.

39. *Id.* at 886.

40. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 493 (2010) (quoting *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935)).

41. Barnett, *Against Administrative Judges*, *supra* note 1, at 1660.

42. *See generally* *Tumey v. Ohio*, 273 U.S. 510 (1927); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972).

that pecuniary incentives (whether flowing directly to the adjudicator or a budget that the adjudicator oversees) create an unconstitutional appearance of partiality.<sup>43</sup> Due process takes offense when a “judge . . . has a direct, personal, substantial pecuniary interest in reaching a conclusion against [a party] in his case.”<sup>44</sup> Such an interest existed, the Supreme Court explained in *Tumey*, when the township and the mayor (as a salary supplement) each received a portion of fees assessed after the mayor decided that the defendant violated Ohio’s alcohol-prohibition statute.<sup>45</sup> Likewise, in *Ward*, the Due Process Clause required a mayor’s recusal from certain ordinance- and traffic-violation cases when the assessed fees were a significant portion of the village’s revenue but did not augment the mayor’s income.<sup>46</sup> For AJs, these decisions indicate that the ability of the party-agency to review AJ performance and award AJs salary bonuses is problematic. The fear that the AJ will rule for the agency to obtain its favor “offer[s] a possible temptation to the average [person] as a judge . . . not to hold the balance nice, clear, and true between the [agency] and the [regulated party].”<sup>47</sup>

Of the three key Supreme Court decisions concerning partiality and administrative adjudicators, the first is of limited relevance. *Withrow v. Larkin* permitted members of a state agency to sequence nonadversary investigatory hearings with later adjudicatory hearings to decide whether to revoke a medical license.<sup>48</sup> At most, this decision suggests that AJs’ ability to adjudicate and engage in other agency duties does not alone raise a partiality problem. Otherwise, it tells us little about appearances of impartiality for lower-level agency officials.

The second decision – concerning ALJs – is more germane and suggests that AJs’ lack of statutory protections is relevant to their impartiality. In *Butz v. Economou*, the Supreme Court granted ALJs absolute official immunity when a disappointed litigant in administrative proceedings sought damages in a collateral lawsuit.<sup>49</sup> In so doing, the Court determined that collateral lawsuits were not necessary because procedural protections in formal agency

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43. *Tumey*, 273 U.S. at 514–15; *Ward*, 409 U.S. at 60.

44. *Ward*, 409 U.S. at 59–60 (quoting *Tumey*, 273 U.S. at 523 (1927)).

45. *Tumey*, 273 U.S. at 535.

46. *Ward*, 409 U.S. at 59–60.

47. *Tumey*, 273 U.S. at 532. The mere payment of fines or fees to the agency would probably not be enough to raise the Due Process Clause’s hackles, despite the fact that the AJ works for the agency and may indirectly benefit from the filled agency coffers. In *Dugan v. Ohio*, 277 U.S. 61 (1928), a decision that the *Ward* Court distinguished, the Court held that a mayor’s limited executive authority and lack of fiscal responsibilities for the town rendered his connection between the fees paid to the town and role as adjudicator “too remote” to create a due process violation. *Ward*, 409 U.S. at 61. For AJs, even assuming that the fines are paid directly to the agency instead of the government generally, AJs’ lack of responsibility for agency fiscal matters likely precludes a due process violation.

48. *Withrow v. Larkin*, 421 U.S. 35, 57 (1975).

49. *Butz v. Economou*, 438 U.S. 478, 512–13 (1978).

adjudication and appellate judicial proceedings permitted opposing arguments and error correction.<sup>50</sup> More significantly, it held that the “more important” consideration was that “the process of agency adjudication is currently structured [under the APA’s requirements for on-the-record hearings] so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency.”<sup>51</sup> This decision does not speak directly to an ALJ’s appearance of bias. But it reveals that statutory structures that protect administrative adjudicators from agency pressure are relevant to assessing an adjudicator’s “independent judgment on the evidence before him [or her].”<sup>52</sup> AJs lack these “more important” protections.<sup>53</sup>

The final and most relevant decision, *Schweiker v. McClure*, held that no unconstitutional appearance of partiality existed with certain private insurance-carrier AJs.<sup>54</sup> Under Medicare Part B, the Secretary of Health and Human Services contracts with insurance carriers to administer the payment of Part B claims.<sup>55</sup> A claimant may seek review of a carrier’s refusal to pay a claim on the Secretary’s behalf.<sup>56</sup> The carrier chooses a hearing officer – often a current or former employee of the carrier – for that review, and that review may include an oral hearing.<sup>57</sup> The Court held that the use of these hearing officers was not problematic, despite their various connections to the insurance carriers, because the carriers, acting as mere agents of the Secretary, had no interest in the outcome of a determination.<sup>58</sup> Money to pay claims comes from federal funds, not the carrier’s funds, and the government, not the carrier, pays the hearing officer’s salary and administrative costs.<sup>59</sup> The challenging parties, moreover, had not brought any evidence “to support their assertion that, for reasons of psychology, institutional loyalty, or carrier coercion, [AJs] would be reluctant to differ with carrier determinations.”<sup>60</sup> The Court concluded by noting that the AJs’ former or current employment relationship with the carrier did not create the same partiality concerns as “professional relationships between a judge and a former partner or associate.”<sup>61</sup>

But *McClure* is hardly the shield from administrative partiality challenges that it may first appear. First, unlike the carriers in *McClure*, federal agencies appoint AJs and are usually interested in administrative adjudica-

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50. *Id.*

51. *Id.* at 513–14.

52. *Id.* at 513.

53. *Id.*

54. *Schweiker v. McClure*, 456 U.S. 188, 196–97 (1982).

55. *Id.* at 190.

56. *Id.* at 191.

57. *Id.*

58. *Id.* at 190–91.

59. *Id.* at 196.

60. *Id.* at 196 n.10.

61. *Id.* at 196 n.11.



tion.<sup>62</sup> These agencies are often parties in agency hearings and seek to advance their agency policies through adjudication.<sup>63</sup> Second, because the disinterested carriers employ the hearing officers, the Court had no reason to consider what effect the hiring, salary control, and firing of an interested party would have on the partiality inquiry. Indeed, these powers go directly to evidence of psychological and coercive pressures that the Court indicated was relevant, but absent, in *McClure*.

If *McClure* nonetheless lingers as an AJ-partiality antidote, the Court's more recent *Caperton* and *Free Enterprise Fund* decisions limit its potency.<sup>64</sup> By requiring the recusal of a judge on whose election a litigating party had a disproportionate impact, *Caperton* demonstrates the salience of a party's role in appointing or electing an adjudicator.<sup>65</sup> This issue was not presented in *McClure* because the appointing insurance company, according to the Court, had no interest in the proceedings; a federal agency ultimately had to pay any approved claims.<sup>66</sup> In other words, the insurance company in *McClure* was not a party to the proceedings before the hearing officer. For AJs, agencies will often be parties whose own regulatory policy is at issue, and the application of that policy will impact private parties.

*Free Enterprise Fund*, for its part, addresses the relationship between control and independence – an issue that *McClure* does not address at all.<sup>67</sup> Recall that the Court in *Free Enterprise Fund* noted that “one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will.”<sup>68</sup> To be sure, the Court was focused on the virtue of control in the context of the President's constitutional supervision over the administrative state.<sup>69</sup> But the relationship between control and independence is no different in the partiality context; the only difference is that the virtue of independence is favored over control. Indeed, the Court appeared to approve of dual for-cause provisions that protected ALJs based on their need for independence as adjudicators.<sup>70</sup> The issue likely escaped the *McClure* Court's attention because, as with the appointment concern, the insurance company's lack of interest in the proceedings severed the link between the company's ability to remove the hearing officers and the substance of the officer's decision. With AJs, however, the

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62. Barnett, *Against Administrative Judges*, *supra* note 1, at 649.

63. *Id.* at 648.

64. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010).

65. *Caperton*, 556 U.S. at 886–87.

66. *McClure*, 456 U.S. at 196.

67. *Free Enter. Fund*, 561 U.S. at 495.

68. *Id.* at 493 (quoting *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935)).

69. *Id.* at 495–96.

70. *See id.* at 507 n.10 (“[U]nlike members of the Board, many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions, see §§ 554(d), 3105, or possess purely recommendatory powers.”).

relationship remains intact because the agency is a party that has various forms of control – including the ability to remove, discipline, or reward – the presiding adjudicator.

#### IV. FORMALISM AND ADMINISTRATIVE AGGRANDIZEMENT

Partiality challenges to AJs fit well within not only relevant precedent, but also broader trends in structural litigation. The Roberts Court has applied a formalist, as opposed to a functionalist, methodology to separation-of-power (or structural) claims concerning the federal administrative state. Formalism uses the Constitution's three Vesting Clauses to separate federal power clearly into the three branches and relies upon prophylactic boundaries and structures to shield the three branches from one another.<sup>71</sup> Separation-of-powers violations occur "whenever the categorizations of the exercised power and the exercising institution do not match and the Constitution does not specifically permit such blending."<sup>72</sup> Functionalism, in contrast, asks whether a particular practice or structure impermissibly limits the "core function" of the affected branch.<sup>73</sup> As described below, the Roberts Court, despite contrary and often fluctuating precedent, has applied formalism to claims concerning the President's removal power, the Appointments Clause, and Article III protections. The use of formalism is as controversial as it is consistent in these contexts. These same prophylactic measures, however, have a long, uncontroversial provenance in partiality challenges. Moreover, limiting appearances of partiality provides a modulated response to leading concerns over the fairness of the administrative state.

##### A. Formalism's Triumph

After largely ignoring structural matters for nearly twenty years, the Court has welcomed separation-of-powers challenges over the past five years.<sup>74</sup> In so doing, the Court has not only addressed or expressed interest in addressing numerous structural matters, but it has also approached these matters almost exclusively in formal terms, attempting to create prophylactic, clear boundaries for the various structural matters that it has addressed, without regard to whether the "innovation" at issue meaningfully impacts the affected branch.<sup>75</sup>

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71. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995) (stating that separation of powers serves as "a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict").

72. Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CAL. L. REV. 853, 858 (1990).

73. Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253, 1255 (1988).

74. See generally Lawson, *supra* note 72.

75. See *Plaut*, 514 U.S. at 239.

Consider first the President's implied power to remove executive officials. The Constitution says nothing expressly about whether the President must have the ability to remove all or certain executive officials at will. In *Morrison v. Olson*, the Supreme Court upheld the Special Counsel's protection from the Attorney General's at-will removal because the President's ability to remove the official at will was not central to the "functioning of the Executive Branch."<sup>76</sup> In doing so, the Court rejected Justice Scalia's dissenting formalist argument with its "rigid demarcation" that the President had to be able to remove all executive officers at will as "extrapolation from general constitutional language which we think is more than the text will bear."<sup>77</sup>

This was the Court's last word on the removal power until the Roberts Court took up the issue more than twenty years later in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*.<sup>78</sup> There, the Court invalidated the use of dual for-cause removal provisions that provided executive officers two levels of insulation (one level of for-cause removal protection for the executive officials at issue and one for the officials who could remove them) from the President's supervision.<sup>79</sup> The Court rejected the dissent's functional argument that the removal power was neither necessary nor sufficient for the President to supervise the executive officials.<sup>80</sup> Instead, it exalted a formal limit on more than one for-cause removal provision between an official and the President as a mechanism for protecting the President from congressional overreach.<sup>81</sup> This is but one example of the Roberts Court's reliance on formalism.

The Court also moved from a functional to formal analysis when considering Article III powers. Article III provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."<sup>82</sup> The question in the administrative context concerns which kinds of claims agencies can decide without violating Article III. A couple of years before *Morrison v. Olson*, the Supreme Court applied functional reasoning in upholding the ability of the Commodities Futures Trading Commission ("CFTC") to hear certain state-law, common-law counterclaims in *CFTC v. Schor*.<sup>83</sup> Over

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76. 487 U.S. 654, 691 (1988).

77. *Id.* at 690 n.29.

78. 561 U.S. 477 (2010).

79. *See id.* at 497.

80. *See id.* at 499–500.

81. *See id.* at 498–502; *see also* Ronald J. Krotoszynski, Jr., *Cooperative Federalism, the New Formalism, and the Separation of Powers Revisited: Free Enterprise Fund and the Problem of Presidential Oversight of State-Government Officers Enforcing Federal Law*, 61 DUKE L.J. 1599, 1610–11 (2012) ("[T]he majority opinion[] in *Free Enterprise Fund* . . . incorporate[s] and reflect[s] strongly formalist reasoning."); *accord* Michael P. Allen, *The Roberts Court and How to Say What the Law Is*, 40 STETSON L. REV. 671, 683 (2011).

82. U.S. CONST. art. III.

83. 478 U.S. 833, 835–36 (1986).

the formalist dissent of Justice Brennan,<sup>84</sup> the Court applied a functional inquiry that considered whether the grant of jurisdiction to the agency divested Article III courts of the “essential attributes of judicial power,” the powers that the agency exercises that are normally reserved to Article III courts, why Congress departed from using Article III courts, and the importance and origin of the adjudicated rights.<sup>85</sup> But, as in *Free Enterprise Fund*, the Roberts Court again turned to formalism in *Stern v. Marshall* when it held that bankruptcy courts could not decide certain state-law counterclaims that did not impact a creditor’s proof of claim.<sup>86</sup> The Court acknowledged that its ruling (and the unconstitutional assignment of state-law claims to an Article I tribunal) would “not change all that much,”<sup>87</sup> but it refused to “compromise the integrity of the system of separated powers . . . , even with respect to challenges that may seem innocuous at first blush.”<sup>88</sup>

With the Appointments Clause, the Court’s jurisprudence has largely remained formalist or textualist. The Appointments Clause requires the President to nominate and the Senate to confirm principal officers.<sup>89</sup> In the so-called “Excepting Clause,” Congress may use the same appointment process as for principal officers or, in its discretion, bestow the appointment of “inferior officers” “in the President alone, in the Courts of Law, or the Heads of Departments.”<sup>90</sup> In these cases, the Court is usually seeking to distinguish principal from inferior officers to determine whether an appointment under the Excepting Clause is permissible,<sup>91</sup> or to distinguish inferior officers from employees to determine whether the Appointments Clause applies at all.<sup>92</sup> When an inferior officer is at issue, the Court may also have to define “department” or “head” of a department because not just any official within any agency can appoint inferior officers.<sup>93</sup> The Court, despite some detours, has provided generally clear guidance on these issues. For instance, an inferior officer is one “whose work is directed and supervised at some level” by principal officers,<sup>94</sup> and “departments” are those “freestanding component[s] of the Executive Branch, not subordinate to or contained within any other such component.”<sup>95</sup> A formalist, textual approach to the Appointments Clause likely causes less controversy because of the limited nature of the inquiries and the detailed constitutional text, relative to the vague text in Article III

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84. *See id.* at 859–67 (Brennan, J., dissenting).

85. *See id.* at 851 (majority opinion).

86. 564 U.S. 462, 503 (2011).

87. *Id.* at 502.

88. *Id.* at 503.

89. U.S. CONST. art. II, § 2, cl. 2.

90. *Id.*

91. *See, e.g., Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 510–11 (2010).

92. *See, e.g., Freytag v. Comm’r*, 501 U.S. 868 (1991).

93. *See Free Enter. Fund*, 561 U.S. at 510–11.

94. *Id.* at 510 (quoting *Edmond v. United States*, 520 U.S. 651, 662–63 (1997)).

95. *Id.* at 511.

concerning “judicial powers” or the silence in Article II concerning the President’s removal powers.<sup>96</sup>

The Roberts Court’s penchant for formalism, clear boundaries, and prophylaxis suggests that partiality challenges would be as welcome as other structural challenges. Indeed, much as with the Appointments Clause, formalism and protective walls are not controversial in the partiality context, strongly suggesting that changes in the Court’s membership should not affect the success of partiality challenges. To overcome the presumption that adjudicators are impartial,<sup>97</sup> the Court looks for incentives or certain features relating to an adjudicator’s tenure that raise reasonable doubts over the adjudicator’s impartiality. Evidence of actual bias is not necessary.<sup>98</sup> Limiting when an adjudicator can hear a case that financially interests her, impacts a budget that she oversees, or concerns a party that had a disproportionate impact on her appointment were all formal limits that earlier decisions used to prevent hard-to-uncover actual bias<sup>99</sup> and to protect the reputation and authority of the tribunal at issue.<sup>100</sup> Relatedly, preventing a party-agency from hiring, disciplining, and removing an AJ before whom it appears provides clear boundaries to prevent actual bias and to protect the administrative tribunal’s reputation.

Indeed, AJ challenges permit perhaps the best kind of formalism: clear rules that easily further the underlying objectives of prohibiting an appearance of partiality. The common features of AJs that create partiality concerns – the party-agency’s direct hiring of, oversight of, and ability to remove AJs – are easy to identify. Unlike in *Caperton*, one need not determine when a party has a “significant and disproportionate,”<sup>101</sup> yet indirect, influence on an adjudicator’s selection because the agency directly chooses AJs. And unlike in *Ward*, one need not determine whether the fiscal connection between a ruling and a budget for which the adjudicator oversees is sufficiently close to cause partiality problems because the agency has the authority to award bonuses to (and remove) AJs directly. Hiring, oversight, and removal are also directly connected to the underlying objectives of limiting hard-to-uncover bias and protecting the integrity of the tribunal. In contrast, the *Free Enterprise Fund* Court’s refusal to permit dual for-cause removal provisions – but

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96. See Kent Barnett, *Standing for (and up to) Separation of Powers*, 91 IND. L.J. 665, 669 (2016) (citing John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1944–45 (2011)).

97. See *United States v. Morgan*, 313 U.S. 409, 421 (1940); see also *Schweiker v. McClure*, 456 U.S. 188, 195 (1982).

98. See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 882 (2010) (before finding appearance of partiality, noting the judge at issue declared he had no actual bias and stating the Court would not determine whether actual bias existed).

99. See Dmitry Bam, *Making Appearances Matter: Recusal and the Appearance of Bias*, 2011 B.Y.U. L. REV. 943, 968 (discussing how recusal standards in American jurisdictions center around appearances of impartiality).

100. See *id.* at 967–69.

101. *Caperton*, 556 U.S. at 884.

its acceptance of one level of protection – smacked of arbitrariness because, as Justice Breyer explained in his dissent, the second level of protection seemed highly unlikely to have any effect on the President’s supervisory power in light of the permissible first level that precluded him from removing principal officers without cause.<sup>102</sup>

### *B. Pragmatic Method of Addressing Administrative Aggrandizement*

Scholars<sup>103</sup> and members of the Supreme Court, as I discuss below, have recently expressed concern at what appears to be agencies’ ever-increasing power with questionable constitutional authority. I do not enter that debate here. Instead, I argue that for those Justices who are concerned with administrative overreach, attending to the AJs’ partiality problems provides a pragmatic and realistic first step. Partiality challenges are more likely to attract their colleagues who are not skeptical of administrative aggrandizement than recent suggested challenges to *Chevron* deference, the nondelegation doctrine, and *Auer* deference.

#### 1. Suggested Challenges to Administrative Law

*First.* One could attack *Chevron* deference – under which courts defer to agencies’ reasonable interpretations of ambiguous statutes<sup>104</sup> – as Justice Thomas has advocated, on originalist grounds. Despite authoring one of the Court’s opinions that most significantly expanded *Chevron* deference,<sup>105</sup> Justice Thomas has more recently argued in his concurring opinion in *Michigan v. EPA* that *Chevron* deference presented “serious separation-of-powers questions” because it either, if interpreting a statute, contravened the original understanding of the courts’ Article III power to “say what the law is,”<sup>106</sup> or, if making policy, violated the prohibition on delegating legislative power under Article I.<sup>107</sup>

But such a direct attack on *Chevron* is unlikely to succeed. First, no other Justice has suggested going so far. Second, *Chevron* may not be an

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102. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 525–30 (2010) (Breyer, J., dissenting).

103. See, e.g., Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1245 (1994); PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014).

104. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

105. See *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (requiring courts to defer to agencies’ reasonable interpretations of ambiguous statutes even if courts have previously indicated that another interpretation of the ambiguous statutory language is preferred).

106. *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

107. *Id.*

appropriate target. Justice Scalia had argued that *Chevron* can reasonably be reconciled with the Article III Vesting Clause as consistent with longstanding judicial deference to federal executive actions in mandamus proceedings.<sup>108</sup> Likewise, *Chevron* may be consistent with *Marbury v. Madison*.<sup>109</sup> Despite *Marbury*'s clarion call for courts to "say what the law is,"<sup>110</sup> the decision recognized the distinction between judicially enforceable "specific duties" and congressionally assigned discretion to the executive that exists outside the judicial province.<sup>111</sup> These distinctions are exceedingly similar to *Chevron*'s distinctions between clear congressional commands and delegating interpretive authority to executive agencies.<sup>112</sup>

That said, several Justices – and perhaps even the entire Court – have indicated their concern over a full-throated *Chevron* doctrine. One expression of the sentiment comes from a majority of Justices' failure to apply *Chevron* where it would seem to apply. When recently concluding that the Fair Housing Act permitted disparate-impact claims,<sup>113</sup> the Court ultimately agreed with the Housing and Urban Development's (HUD) notice-and-comment regulation.<sup>114</sup> It, however, failed to engage in a *Chevron* inquiry.<sup>115</sup> Perhaps this was because, as the dissenting Justices feared, HUD had not given its "fair and considered judgment on the matter in question"<sup>116</sup> by issuing the regulation shortly after the Court had called for the Solicitor General's views in a prior case concerning the same issue.<sup>117</sup> But the majority's silence – especially its failure to refer to precedent that could support *Chevron*'s ban-

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108. *United States v. Mead Corp.*, 533 U.S. 218, 242–43 (2001) (Scalia, J., dissenting); see also Jerry L. Mashaw, *Center and Periphery in Antebellum Federal Administration: The Multiple Faces of Popular Control*, 12 U. PA. J. CONST. L. 331, 346 (2010) (agreeing that writ review was historically "quite deferential" but arguing that common law actions against executive officials "could provide substantial relief"). This defense from constitutional infirmity does not address the striking conflict with the APA's command that "the reviewing court shall decide all relevant questions of law [and] interpret constitutional and statutory provisions." 5 U.S.C. § 706 (2012). But perhaps the same historical practice could inform the background understanding of the enacting Congress as to when the courts should set aside agency action. See *Mead*, 533 U.S. at 242 n.2 (Scalia, J., dissenting).

109. See generally *Marbury*, 5 U.S. at 137.

110. *Id.* at 177.

111. *Id.* at 165–66, 170.

112. 1 RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* 163 (5th ed. 2010).

113. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2525 (2015).

114. See *id.*

115. See generally *id.*

116. See *id.* at 2542 (Alito, J., dissenting) (quoting *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012)).

117. See *id.* at 2543.

ishment from its decision<sup>118</sup> – created questions over why *Chevron* didn't apply where it otherwise would.

The Court has also expressly limited, or certain Justices have sought to limit, *Chevron*'s reach. The Court in *King v. Burwell* refused to apply *Chevron* when, consistent with an IRS Rule, it permitted tax credits for taxpayers enrolled in federal health-insurance exchanges.<sup>119</sup> The Court eschewed *Chevron*, despite finding the relevant statutory language ambiguous,<sup>120</sup> because of the tax credits' "deep 'economic and political significance'" and the likelihood that Congress would not have delegated the resolution of this health-insurance-policy question to a taxing agency.<sup>121</sup> The Court had suggested in earlier decisions that an agency's new-found power to regulate in an area of such significance was important for determining whether, under *Chevron*'s inquiry, the statute was ambiguous.<sup>122</sup> *King* went further and indicated that such questions could be inappropriate for *Chevron*'s applicability altogether.<sup>123</sup> Relatedly, three dissenting Justices in *City of Arlington v. FCC* argued that *Chevron* should engage in a more searching inquiry to determine whether Congress delegated interpretive authority to the agency as to the specific statutory question at issue.<sup>124</sup>

But even these two modes of restricting *Chevron*'s reach have problems that accompany limiting agency autonomy. Ignoring *Chevron*'s applicability is not a solution because doing so creates an opaque, incoherent doctrine. That opacity may be especially troubling, even to Justices sympathetic to aggrandizement arguments, because they, like Justice Scalia, may view *Chevron* as beneficial in providing a stable "background rule of law against which Congress can legislate."<sup>125</sup> Limiting *Chevron*'s reach is a better approach. But a standards-based exception from *Chevron* suffers from similar opacity concerns. Doesn't the Court perennially accept questions of "deep economic and political importance"? Isn't that why Court-watching is at its zenith at the end of every Term in June? More importantly, even by *King*'s own terms, the political-and-economic exception is applicable only in "extraordi-

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118. See *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1352 (2015) (refusing to grant *Skidmore* deference to an EEOC guideline because, in part, it was promulgated after the Court had granted certiorari in the case at issue).

119. *King v. Burwell*, 135 S. Ct. 2480, 2487, 2488–89, 2496 (2015).

120. See *id.* at 2492.

121. *Id.* at 2488–89 (quoting *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014)).

122. See, e.g., *Util. Air. Regulatory Grp.*, 134 S. Ct. at 2444; *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 131–34 (2000), *superseded by statute*, Family Smoking Prevention & Tobacco Control Act, Pub. L. No. 111-31, §§ 907(d)(3)(A)–(B), 123 Stat. 1776 (2009) (codified at 21 U.S.C. §§ 387–387u).

123. *King*, 135 S. Ct. at 2488–89.

124. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1877 (2013) (Roberts, C.J., dissenting).

125. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517.



nary” cases.<sup>126</sup> If the Court’s decision in *City of Arlington* indicates that agencies’ pronouncements as to their own jurisdiction are not extraordinary instances, there might be little left in the set of excepted interpretations to make such case-by-case limitations worthwhile.

*Second.* Overruling or significantly narrowing the nondelegation doctrine, in contrast, would dramatically affect agencies’ powers. But it suffers from the same problems that inflict the *Chevron*-based challenges. Justice Thomas has also attacked the Court’s nondelegation doctrine, which prohibits Congress from delegating lawmaking authority to agencies without providing an “intelligible principle,” on several grounds.<sup>127</sup> He argued that the Court had improperly permitted Congress to do more than bestow the authority upon the President to make factual determinations as to whether a particular contingency had come into being<sup>128</sup> or make certain policy decisions related to foreign affairs.<sup>129</sup> Moreover, he argued that the Court, by misreading its precedent, had improperly permitted the “intelligible principle” to apply to more than regulating the conduct of the branch at issue<sup>130</sup> and, over the years, to become so elastic as to have no limiting principle.<sup>131</sup> As with his frontal challenge to *Chevron*, Justice Thomas stands alone, likely because his challenge to the nondelegation doctrine requires a substantial revision to longstanding precedent. Even if others share his originalist leanings, the substantial disruption to the modern administrative state is likely too much for many of his colleagues to bear. Justice Thomas concedes that a full-throated nondelegation doctrine would require “inhibit[ing] the government from acting with the speed and efficiency Congress has sometimes found desirable.”<sup>132</sup> But it would do more than lead to slower government action; it would render agencies mere shadows of their former selves. Congress would be required to legislate on technical subjects on a magnitude too large for it to keep a modern economy and government functioning. In short, a proposed nondelegation renaissance likely makes functionalists out of formalists.

*Third.* Perhaps the most promising challenge concerns *Seminole Rock* or *Auer* deference. Under that doctrine, first articulated in *Bowles v. Seminole Rock* in 1945<sup>133</sup> and reaffirmed in *Auer v. Robbins* in 1997,<sup>134</sup> courts defer to agencies’ interpretations of their own regulations unless “plainly erroneous or inconsistent.”<sup>135</sup> Commenters have defended (and challenged) *Auer* deference as being grounded in notions of agency expertise, the agen-

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126. *King*, 135 S. Ct. at 2489–90.

127. *Dep’t of Transp. v. Ass’n of Am. R.R.s*, 135 S. Ct. 1225, 1242–44 (2015) (Thomas, J., concurring).

128. *See id.* at 1246–47.

129. *See id.* at 1247–48.

130. *See id.* at 1249–50.

131. *See id.* at 1251.

132. *Id.* at 1252.

133. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413–14 (1945).

134. *Auer v. Robbins*, 519 U.S. 452, 461–62 (1997).

135. *Id.* at 461 (citations omitted).

cy's role in drafting congressional legislation, or a means of providing uniformity in lower-court decisions.<sup>136</sup> Despite authoring the Court's *Auer* decision, Justice Scalia indicated in separate opinions that the Court should end *Auer* deference.<sup>137</sup> Influenced by his former law clerk, Professor John Manning,<sup>138</sup> Justice Scalia had argued that deferring to agencies' interpretations of regulations that they promulgated "seems contrary to fundamental principles of separation of powers" and encourages agencies to draft vague rules to interpret, "in future adjudications, . . . [as] it pleases."<sup>139</sup> Justice Scalia had reiterated his view,<sup>140</sup> and Justices Thomas<sup>141</sup> and Alito,<sup>142</sup> along with Chief Justice Roberts,<sup>143</sup> seem open to rethinking the issue.

Although I favor reimagining *Auer* deference into an analogue of *Skidmore v. Swift & Co.*,<sup>144</sup> in which the courts consider various factors to determine whether to give the agency's interpretation weight,<sup>145</sup> it is unclear if a majority of the Court, especially after Justice Scalia's death, would be willing to revise *Auer* deference. Only Chief Justice Roberts and Justices Thomas

136. See *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1339–42 (2013) (Scalia, J., concurring).

137. See *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 68–69 (2011) (Scalia, J., concurring).

138. John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996) (cited in *Talk Am., Inc.*, 564 U.S. at 68 (Scalia, J., concurring)).

139. *Talk Am., Inc.*, 564 U.S. at 68–69 (Scalia, J., concurring).

140. See *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1211–13 (2015) (Scalia, J., concurring); *Decker*, 133 S. Ct. at 1339–42 (Scalia, J., concurring).

141. See *Perez*, 135 S. Ct. at 1225 (Thomas, J., concurring).

142. *Id.* at 1210–11 (Alito, J., concurring in part and concurring in the judgment) ("I await a case in which the validity of *Seminole Rock* may be explored through full briefing and argument."). See also *Decker*, 133 S. Ct. at 1338–39 (Roberts, C.J., concurring).

143. See *Decker*, 133 S. Ct. at 1338–39 (Roberts, C.J., concurring).

144. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) ("We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.").

145. See Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock's Domain*, 79 GEO. WASH. L.J. 1449, 1458 (2011) (suggesting that *Seminole Rock* may be better if *Skidmore*-like weight, instead of *Chevron*-like deference, applied to informal agency interpretations of regulations); Nicholas R. Bednar, Comment, *Defying Auer Deference: Skidmore as a Solution to Conservative Concerns in Perez v. Mortgage Bankers Association*, MINN. L. REV.: DE NOVO (June 24, 2015), <http://www.minnesotalawreview.org/2015/06/defying-auer-deference-skidmore-solution-conservative-concerns-perez-v-mortgage-bankers-association/>.

and Alito have shown interest in reconsidering the doctrine.<sup>146</sup> The other Justices may simply be hesitant to overrule a longstanding doctrine on *stare decisis* grounds. Or they may have pragmatic concerns over how easily the Court can fell the longstanding doctrine, given that agencies may rely on both their interpretation of a statute – for which *Chevron* deference may be appropriate – and a regulation in a particular interpretation. Or they may not be convinced that the agencies’ combined rulemaking and adjudicatory functions present meaningful separation-of-powers concerns because the regulatory state is founded on countenanced notions of combined legislative, adjudicatory, and enforcement functions as all part of executive authority.<sup>147</sup> Or they may think that the Court’s various limits on the doctrine – its refusal to defer when the agency merely “parrots” the statute via the interpreted regulation,<sup>148</sup> when the interpretation does not appear to reflect an “agency’s fair and considered judgment,”<sup>149</sup> when the agency’s interpretations are inconsistent,<sup>150</sup> or when the agency merely presents a “post hoc rationalization”<sup>151</sup> – are sufficient to prevent the doctrine from permitting the worst, and perhaps unlikely, abuses.<sup>152</sup>

## 2. Impartiality as a Realistic First Step

Unlike challenges to *Chevron*, nondelegation, and perhaps even *Auer*, bias-based challenges against agency adjudicators are more likely to command a majority of interested Justices. The partiality argument against administrative judges in Part II relies primarily on two recent Court decisions, each of which commanded a majority, with only Justice Kennedy joining the Court’s more liberal bloc in one and the more conservative bloc in the other.

Consider *Caperton*. The *Caperton* majority indicated its concern over a party’s significant, although indirect, influence in the selection of a judge.<sup>153</sup> The four more conservative dissenting Justices, despite “shar[ing] the majority’s sincere concerns about the need to maintain a fair, independent, and im-

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146. Judge Frank Easterbrook had identified a possible vehicle for the Court to rethink *Auer*, but the Court denied certiorari. See *Bible v. United Student Aid Funds, Inc.*, 807 F.3d 839, 840–41 (7th Cir. 2015) (Easterbrook, J., concurring in denial of rehearing en banc), *cert. denied*, 136 S. Ct. 1607 (2016) (mem.).

147. See Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of Auer*, U. CHI. L. REV. (forthcoming), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2716737##](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2716737##).

148. See *Gonzales v. Oregon*, 546 U.S. 243, 256–57 (2006).

149. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) (citations omitted).

150. See *id.* (citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994)).

151. *Auer v. Robbins*, 519 U.S. 452, 462 (1997) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988)).

152. See Sunstein & Vermeule, *supra* note 147, at 19–20 (discussing “checks on agencies built into the *Auer* framework”).

153. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 883–85 (2009).

partial judiciary – and one that appears to be such,”<sup>154</sup> largely criticized the majority’s failure to define when a party had a sufficient indirect influence over the state judge’s selection to violate due process.<sup>155</sup> Notably, the challenge to AJs does not suffer this failing because of the agencies’ direct appointment and control over AJs. To be sure, certain questions may still exist: For instance, what effect do regulations that limit agency interference or removal of an AJ have? Can agencies ever sufficiently separate the division of the agency that hires and removes AJs from the division of the agency that appears as a party? Does it matter whether the agency appears as an adversarial party, as opposed to merely having certain policy preferences relevant to the adjudication between private parties? Nevertheless, the boundaries of an AJ-partiality claim are much more defined than in *Caperton* state-election claims, in which courts must attempt to intuit when a candidate’s supporter, who also has a case before the court, has impermissibly influenced an election by donating money to the candidate and third parties. In other words, even the dissenting Justices should have little quarrel with a *Caperton* claim in the AJ context.

Then turn to *Free Enterprise Fund*. The more conservative majority recognized the relationship between removal, control, and independence.<sup>156</sup> They did so in the context of not only political appointees, but also agency adjudicators.<sup>157</sup> They attempted to defend ALJs’ dual for-cause protection from removal based on, among other things, their adjudicative function.<sup>158</sup> This distinction reveals the majority’s discomfort with permitting the President (or perhaps any agency head) to directly control an agency adjudicator and its receptiveness to considering how control affects partiality in the administrative context. The more liberal dissenting Justices, although skeptical of the President’s removal power as a talisman of control,<sup>159</sup> recognized that regulation through impartial adjudication can arise by protecting adjudicators from at-will removal.<sup>160</sup> Conversely, at-will removal of agency adjudicators leads to partial adjudication, which due process proscribes.<sup>161</sup> In other words, all of the Justices appeared to recognize the necessity of protecting adjudicators from agency control as a means of protecting their impartiality.

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154. *Id.* at 890 (Roberts, C.J., dissenting).

155. *See id.* at 890–91 (“Unlike the established grounds for disqualification, a ‘probability of bias’ cannot be defined in any limited way. The Court’s new ‘rule’ provides no guidance to judges and litigants about when recusal will be constitutionally required.”); *see also id.* at 890–99.

156. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 501 (2010).

157. *See id.* at 506–07.

158. *See id.* at 507 n.10.

159. *See id.* at 524 (Breyer, J., dissenting).

160. *Id.* at 522.

161. *See Schweiker v. McClure*, 456 U.S. 188, 195–96 (1982) (citing *In re Murchison*, 349 U.S. 133, 136 (1955)).

Both dissenting blocs in *Caperton* and *Free Enterprise Fund* worried about the effects of the majority's rulings, either on litigation strategy or administrative chaos.<sup>162</sup> A ruling that the current AJ system is unconstitutional would have a widespread effect on the federal government's largest cadre of adjudicators. Not only were the majorities in both cases unmoved about the supposed effects of their rulings, but agency adjudication already has a template for sufficiently independent adjudicators – the APA's protections for ALJs. The solution is for agencies to use ALJs when permitted under their implementing statutes or for Congress to pass general legislation requiring agencies to engage in formal adjudication whenever a statute or agency permits an evidentiary hearing.

To avoid disruption, the Court could rule that due process does not require as much from the administrative judiciary as it does state and federal judges. After all, courts have only required that agency heads avoid having an “unalterably closed mind on matters critical to the disposition of the rulemaking” to satisfy due process in the rulemaking context,<sup>163</sup> a standard that is so high as to have little practical effect. But doing so in adjudication is problematic. First, such an ineffective standard renders administrative hearings susceptible to allegations that they are merely for show. Second, creating for-show hearings is anathema to those seeking effective, respected government action and those seeking to limit arbitrary government action. Moreover, creating a different partiality norm for administrative adjudication, as opposed to other forms of adjudication, would add a new complexity to the already case-by-case Due Process Clause doctrine.

Because of the implications of a judicial decision concerning AJ partiality, Congress and the President should act before courts force them to. Doing so not only avoids administrative chaos, but it returns agency adjudication to its intended form under the APA.<sup>164</sup> The very problems that I identified for AJs here are not new. Shortly after the APA's enactment, U.S. Attorney General J. Howard McGrath stated that “[i]f salaries and promotions are subject to agency control, there is always danger that a subtle influence will be exerted upon the examiners to decide in accordance with agency wishes.”<sup>165</sup> Guaranteeing that agency adjudication has its constitutional appearance of impartiality – the appearance that Congress intended it to have under the APA – is not too much for Congress and the President to accomplish.

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162. See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 899–900 (2009) (Roberts, C.J., dissenting); *id.* at 902–03 (Scalia, J., dissenting); *Free Enter. Fund*, 561 U.S. at 536–45 (Breyer, J., dissenting); see also Barnett, *Avoiding Independent Agency Armageddon*, *supra* note 33, at 1364 (discussing the *Free Enterprise Fund* dissenters' alarm at the potential impact of the Court's decision).

163. *Ass'n of Nat'l Advertisers v. FTC*, 627 F.2d 1151, 1154 (D.C. Cir. 1979).

164. See William Funk, *The Rise and Purported Demise of Wong Yang Sung*, 58 ADMIN. L. REV. 881, 882–89 (2006).

165. Administrative Procedure Act, Promotion of Hearing Examiners, 41 Op. Att'y Gen. 74, 78 (1951).

2016]

BIAS CHALLENGES

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## V. CONCLUSION

The Supreme Court has made clear that it welcomes structural challenges to the administrative state. Perhaps challenges to *Chevron* deference, the nondelegation doctrine, *Auer* deference, or the President's authority to remove executive officers will arrive at First Street in the near future. But parties, agencies, the President, and Congress should not overlook partiality challenges concerning AJs. Determining that unconstitutional appearances of partiality exist with AJs requires no overruling of precedent, permits a natural application of existing precedent, and provides a pragmatic means of protecting the apparent fairness of administrative action.

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